

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SHANNON KAHN,

Plaintiff,

V.

TRANSFORCE, INC., d/b/a
TRANSFORCE GROUP, a foreign profit
corporation,

Defendant.

CASE NO. C22-01086-RSM

**ORDER RE: DEFENDANT'S
MOTION TO DISMISS AND
DEFENDANT'S MOTION TO
STRIKE JURY DEMAND**

I. INTRODUCTION

This matter comes before the Court on Defendant TransForce, Inc., d/b/a TransForce Group (“TransForce” or the “Company”)’s Motion to Dismiss under Fed. R. Civ. P. 12(b)(6); Motion to Strike Jury Demand under Fed. R. Civ. P. 12(f) or, alternatively, under Fed. R. Civ. P. 39(a). Dkt. #9. Plaintiff Shannon Kahn opposes both motions. Dkt. #12. The Court finds oral argument unnecessary to resolve the underlying issues. The Court has jurisdiction pursuant to 28 U.S.C. 1332. For the reasons stated below, the Court DENIES IN PART and GRANTS IN PART Defendant’s Motion to Dismiss and GRANTS Defendant’s Motion to Strike Jury Demand.

II. BACKGROUND

Plaintiff Shannon Kahn brings two causes of action against Defendant TransForce for alleged discrimination and retaliation in violation of the Washington Law Against Discrimination (“WLAD”), RCW 49.60. Dkt. #1 (“Complaint”) at 4. Ms. Kahn is a woman residing in King County, Washington. *Id.* at ¶ 1.1. TransForce is a Virginia for profit staffing and recruiting corporation with a focus in the transportation industry. *Id.* at ¶ 1.2.

In July 2020, Defendant TransForce hired Ms. Kahn on a three-month consulting contract. Complaint, ¶ 3.2. In the fall of 2020, Defendant offered Ms. Kahn full-time employment as its Chief Sales Officer (CSO). *Id.* When she accepted TransForce’s employment offer, Ms. Kahn signed a non-disclosure agreement containing a jury waiver. Dkt. #9 at 13. Ms. Kahn alleges she had “early success as TransForce’s CSO” where she “drove increases in the Company’s ... revenue” and led program development efforts “resulting in hundreds of thousands of additional revenue” in 2021. Complaint, ¶ 3.5. Ms. Kahn claims she advocated for increased diversity and inclusion in the workplace “shortly after joining TransForce,” but alleges these suggestions were ignored. Complaint, ¶ 3.9. Ms. Kahn alleges that despite these contributions and her role on the TransForce leadership team, she was “treated differently than her male counterparts” because she was “excluded from key meetings...while other men on the [leadership] team were included.” Complaint, ¶¶ 3.5, 3.7. Further, she claims she was labelled as the cause of conflict although she alleges her questions and concerns about TransForce’s initiatives were shared by some male colleagues and TransForce customers. Complaint, ¶ 3.8.

On May 5, 2022, TransForce terminated Ms. Kahn’s employment citing “too much conflict” and the complaint asserts this reason is pretext for gender discrimination and retaliation for Plaintiff’s advocacy for increased diversity and inclusion. Complaint, ¶ 3.10. Ms. Kahn

1 alleges that the day after her termination, TransForce announced it was hiring a man to fill her
 2 previous role. Complaint, ¶ 3.11.

3 On these facts, Ms. Kahn has asserted two state law claims of employment discrimination:
 4 (1) a claim that TransForce terminated her because of her sex, in violation of the WLAD; and (2)
 5 a claim that TransForce retaliated against her for her suggestions to increase workplace diversity
 6 and inclusion efforts, in violation of the WLAD. Ms. Kahn has also filed a jury demand. *See* Dkt.
 7 #1-2 at 1. Defendant has moved to dismiss both claims and to strike the jury demand. Dkt. #9.

8 III. DISCUSSION

9 A. Legal Standard under Rule 12(b)(6)

10 In making a 12(b)(6) assessment, the court accepts all facts alleged in the complaint as
 11 true and makes all inferences in the light most favorable to the non-moving party. *Baker v.*
 12 *Riverside County Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009) (internal citations omitted).
 13 However, the court is not required to accept as true a “legal conclusion couched as a factual
 14 allegation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550
 15 U.S. 544, 555 (2007)). The complaint “must contain sufficient factual matter, accepted as true,
 16 to state a claim to relief that is plausible on its face.” *Id.* at 678. This requirement is met when
 17 the plaintiff “pleads factual content that allows the court to draw the reasonable inference that the
 18 defendant is liable for the misconduct alleged.” *Id.* The complaint need not include detailed
 19 allegations, but it must have “more than labels and conclusions, and a formulaic recitation of the
 20 elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. Absent facial plausibility,
 21 a plaintiff’s claims must be dismissed. *Id.* at 570.

22 B. Claims under Washington Law Against Discrimination

23 1. Sex Discrimination under the WLAD

1 TransForce moves to dismiss Ms. Kahn's claims under the WLAD on the basis that Ms.
 2 Kahn has failed to identify what facts support each claim. Dkt. #9 at 7. The WLAD was enacted
 3 to protect state inhabitants from practices of discrimination. RCW 49.60.010. The WLAD states
 4 that "it is an unfair practice for any employer to discharge or bar any person from employment
 5 because of...sex. RCW 49.60.180(2). Under RCW 49.60.180, an employee in a protected class
 6 has a cause of action for a discriminatory discharge from employment.

7 A prima facie case of gender discrimination alleging disparate treatment has four
 8 elements: 1) the employee is a member of a protected class; 2) the employee is qualified for the
 9 employment position or performing substantially equal work; 3) the employee suffered an adverse
 10 employment action; and 4) similarly situated employees not in plaintiff's class received more
 11 favorable treatment. *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 818 (9th Cir. 2002); *Davis v. West*
 12 *One Auto. Grp.*, 140 Wash.App 449, 459, 166 P.3d 807 (2007).

13 It is undisputed that Ms. Kahn is female. Dkt. #9 at 7. Ms. Kahn alleges that she was
 14 qualified for her job and was performing satisfactory work. Dkt. #12 at 9. Further, Ms. Kahn
 15 alleges that she, unlike her male colleagues, was deprived of access to her supervisor, excluded
 16 from key meetings, subjected to unique scrutiny, and terminated as a result of sex discrimination.
 17 *Id.* at 12.

18 TransForce argues that Plaintiff fails to state a claim of sex discrimination because she
 19 does not allege facts that she was performing her job satisfactorily at or near the time of her
 20 termination. Dkt. #9 at 7. Additionally, TransForce argues that Ms. Kahn's complaints of being
 21 treated differently and excluded by her male coworkers are merely "hurt feelings" and do not rise
 22 to the threshold of qualifying adverse employment actions. *Id.* at 9. In sum, TransForce asserts
 23 that Ms. Kahn's pleading does not allege a prima facie case of discrimination in satisfaction of

1 the standard set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.
 2 Ed.2d 668 (1973). *Id.* at 7. This is not the standard.

3 In *Sheppard v. David Evans and Associates*, the Ninth Circuit addressed the pleading
 4 standard in discrimination cases. 694 F.3d 1045 (9th Cir. 2012). A plaintiff's complaint must
 5 allege a "plausible" prima facie case of discrimination. *Id.* at 1050. Here, Ms. Kahn's complaint
 6 alleges 1) that she is a woman; 2) she "enjoyed decades of success in corporate leadership roles"
 7 and she "drove increases in the Company's...revenue"; 3) she was excluded from leadership team
 8 meetings directly related to her job and was terminated; and 4) other men on the leadership team
 9 were included in the leadership team meetings and the Company announced it was hiring a man
 10 to fill her role the day after her termination. Complaint, ¶¶ 1.1, 3.3, 3.7, 3.10, 3.11. As the court
 11 in *Sheppard* explained, "the allegation that comparators kept their jobs 'gives rise to an inference
 12 of age discrimination' because it plausibly suggests that Evans had a continuing need for
 13 [Sheppard's] skills and services [because her] various duties were still being performed." 694
 14 F.3d at 1050. Similarly, the Company's next-day announcement that it was hiring a man to fulfill
 15 her previous role gives rise to a reasonable inference that TransForce needed someone to perform
 16 Ms. Kahn's duties and plausibly suggests that employees outside her protected class were treated
 17 more favorably.

18 The Court finds that Ms. Kahn's complaint alleges sufficient facts in support of her sex
 19 discrimination claim under the WLAD to survive a motion to dismiss. Ms. Kahn's complaint
 20 alleges several actions taken by Defendant that could plausibly constitute disparate treatment of
 21 Ms. Kahn on the basis of sex. *See* Complaint. This includes Defendant's exclusion of Ms. Kahn
 22 from key leadership team meetings while other male peers were included and singling her out for
 23 causing conflict despite the fact that some of her male coworkers shared her concerns.
 24 TransForce's Motion to Dismiss is DENIED as to Ms. Kahn's gender discrimination claim.

1 2. *Retaliation under the WLAD*

2 The WLAD prohibits an employer from taking an adverse employment action against an
 3 employee because they “[have] opposed any practices forbidden this chapter.” RCW
 4 49.60.210(1). To establish a prima facie case of retaliation, plaintiff must demonstrate that 1) she
 5 engaged in statutorily protected activity; 2) the defendant took some adverse employment action
 6 against her; and 3) there is a causal connection between the protected activity and the discharge.
 7 *Corville v. Cobarc Servs., Inc.*, 73 Wash.App. 433, 439, 869 P.2d 1103 (1994). Ms. Kahn claims
 8 that TransForce terminated her in retaliation for “her opposition to practices prohibited by the
 9 [WLAD] and for actively promoting diversity and inclusion in the workplace.” Complaint, ¶ 4.5.
 10 TransForce argues that Ms. Kahn has failed to allege 1) that she engaged in protected activity
 11 under the WLAD; 2) that she suffered an adverse employment action; and 3) a causal connection
 12 exists between the protected activity and the adverse employment action. Dkt. #9 at 12–13.

13 Ms. Kahn’s assertion that “shortly after joining TransForce,” she “advocated for
 14 [TransForce] to take steps to increase diversity and inclusion in the workplace” does not plausibly
 15 suggest that 1) she engaged in protected activity under the WLAD or 2) her termination, which
 16 may qualify as an adverse employment action, was casually linked to protected conduct.
 17 Complaint, ¶ 3.9. First, Ms. Kahn’s description of her alleged protected activity does not
 18 plausibly suggest that she engaged in protected activity under the WLAD. Her assertion that she
 19 advocated to “increase diversity and inclusion in the workplace,” without more, does not give to
 20 a reasonable inference that TransForce was engaged in practices forbidden by the WLAD.

21 Second, even if Ms. Kahn’s actions rose to the level of protected activity, she fails to
 22 establish a causal connection sufficient to establish a claim of retaliation. This Court addressed
 23 the issue of a causal connection in *Macon v. United Parcel Service, Inc.*, where the plaintiff
 24 alleged she was terminated in retaliation for filing an EEOC complaint 10 months prior. No. C12-

1 260 RAJ, 2012 WL 5410289 (W.D. Wash. Nov. 5, 2012) at *6. Proximity in time between the
 2 protected activity and the discharge may suggest retaliatory motivation. *Estevez v. Faculty Club*
 3 *of Univ. of Wash.*, 129 Wash.App. 774, 799, 120 P.3d 579 (2005). Even so, a court may not infer
 4 causation from temporal proximity unless the time between the employer's knowledge of the
 5 protected activity and the adverse employment action is very close. *Manatt v. Bank of Am.*, 339
 6 F.3d 792, 802 (9th Cir. 2003) (citing *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121
 7 S.Ct. 1508, 149 L.Ed.2d 509 (2001) (noting that a lapse of even three or four months is too long
 8 to infer causation)). Like the plaintiff in *Macon*, Ms. Kahn must show proximity between the
 9 protected activity and her termination. Ms. Khan's alleged protected activity occurred "shortly
 10 after joining TransForce," in 2020 and her eventual termination two years later in 2022 does not,
 11 on its own, indicate a causal connection sufficient to support a claim of retaliation. Complaint ¶
 12 3.9.

13 Accordingly, the Court GRANTS TransForce's Motion to dismiss plaintiff's retaliation
 14 claim.

15 C. Waiver of Jury Trial

16 Under federal and Washington state law, waiver of jury trial in civil cases must be
 17 "voluntary, knowing, and intelligent." *Godfrey v. Hartford Cas. Inc. Co.*, 142 Wash.2d 885, 898,
 18 16 P.3d 617 (2001) (citing *City of Bellevue v. Acrey*, 103 Wash.2d 203, 207, 691 P.2d 957 (1984)).

19 Ms. Kahn states that she did not knowingly, voluntarily, and intelligently waive her
 20 constitutional right. Dkt. #12 at 17. She supports her argument by stating that jury waiver clauses
 21 are not typically included in non-disclosure agreements (NDA) and citing a Fifth Circuit four-
 22 factor balancing test. Dkt. #12 at 18–22. In response, TransForce asserts that Ms. Kahn's waiver
 23 meets the knowing, voluntary, and intelligent standard because the jury waiver was conspicuously
 24 printed in bold and all capitals, she was given no deadline for reviewing the agreement, and

1 TransForce's Chief Human Resources Officer offered to answer Ms. Kahn's questions about the
2 NDA, but Ms. Kahn asked none. Dkt. #9 at 13–14. The Court agrees with TransForce.

3 The Court finds that the jury trial waiver meets the knowing, voluntary, and intelligent
4 standard. It was conspicuously printed in bold font in all capitals and it was the last clause of the
5 NDA preceding Plaintiff's signature. Further, the waiver expressly states it applies to "ANY
6 LEGAL ACTIONS RELATING TO THE EMPLOYEE'S EMPLOYMENT WITH, OR
7 SEPARATION FROM EMPLOYMENT WITH, THE COMPANY." See Dkt. #9-1, Exhibit A.
8 Further, the TransForce Chief of Human Resources' offer to answer any questions relating to the
9 NDA creates a reasonable inference that the Plaintiff's waiver was knowing, voluntary, and
10 intelligent.

11 Accordingly, the Court GRANTS TransForce's Motion to Strike jury demand under Fed.
12 R. Civ. P. 39(a)(2).

13 **IV. CONCLUSION**

14 Having reviewed Defendant's Motion, Plaintiff's Response, Defendant's Reply, and the
15 remainder of the record, the Court hereby finds and ORDERS

- 16 1) Defendant's Motion to Dismiss Plaintiff's first cause of action for discrimination in
17 violation of the WLAD, Dkt. #9, is DENIED.
18 2) Defendant's Motion to Dismiss Plaintiff's second cause of action for retaliation in
19 violation of the WLAD, Dkt. #9, is GRANTED.
20 3) Defendant's Motion to Strike Plaintiff's Jury Demand, Dkt. #9, is GRANTED.

21 DATED this 20th day of January, 2023.

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24 RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE